No. 93-1044

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

IAN HOFFMAN - - - - - - - Petitioner

versus

TAMMY D. HARRIS, Individually,
COLLEEN WEST, Individually,
MELISA HOFFMAN, Individually,
COMMONWEALTH OF KENTUCKY,
CABINET FOR HUMAN
RESOURCES - - - - - - - Respondents

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents Tammy D. Harris, Colleen West, and the Commonwealth of Kentucky, Cabinet for Human Resources, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit rendered September 21, 1993, in Case No. 92-6161. The Memorandum Opinion of the Court is not recommended for full text publication.

I. COUNTERSTATEMENT OF THE CASE

This is a §1983 action in which the Petitioner, Ian Hoffman, (hereinafter "Hoffman") alleges that his 14th Amendment liberty interests were violated. Specifically, the Cabinet for Human Resources (hereinafter "the Cabinet"), obtained an emergency *ex parte* order to prevent Hoffman from having unsupervised visitation with his infant daughter. A Cabinet employee, Tammy D. Harris, sought an order pursuant to KRS 620.060(1), alleging that Hoffman sexually abused the child. Hoffman claims that the Cabinet and the Department for Social Services employees acted unlawfully in filing an Affidavit with the Fayette County District Court. A post-deprivation hearing was held in which the allegations were substantiated. Thereafter, Hoffman was allowed supervised visitation with the child.

REASONS FOR DENYING THE WRIT

I. An Action Naming the Commonwealth of Kentucky, Cabinet For Human Resources, as Defendant in a 42 U.S.C. §1983 Claim is Barred by the Eleventh Amendment.

The Cabinet is not subject to suit by the Petitioner. A state agency may not be sued in federal court, regardless of the relief sought, unless the state has waived its sovereign immunity under the Eleventh Amendment to the U.S. Constitution, or Congress has overridden it. *Alabama* v. *Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 3057-8, 57 L.Ed.2d 1114 (1978). There is no allegation that Kentucky has waived its Eleventh Amendment immunity in this case, and it is well settled that by enacting 42 U.S.C. §1983 Congress did not abrogate the Eleventh Amendment immunity of any state. *Quern* v. *Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 1143-5, 59 L.Ed.2d 358 (1979). *Will* v. *Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 2309, 105 L.Ed.2d 45 (1989). Moreover, states and state agencies are not "persons" subject to §1983 liability.

In addition, had the Petitioner sought relief against the Cabinet by naming state officials in their official capacity, the same Eleventh Amendment would have been asserted. *Kentucky* v. *Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). In *Will* v. *Michigan Dept. of State Police*, 491 U.S. at 71, the United States Supreme Court held "that neither a state nor its officials acting in their official capacities are 'persons' under §1983."

Regardless, Petitioner did not sue a state official in her official capacity. Petitioner's admitted deficiencies in pleading cannot be corrected or amended by language in a petition. Deficiencies can only be amended by the filing of an amended pleading, either by right or leave of court. *Pritchard* v. *Reinfair*, 945 F.2d 185 (7th Cir. 1991).

There is no conflict of law or principles in the case at hand. Petitioner's complaint against the Cabinet is clearly barred by the Eleventh Amendment and the writ should be denied accordingly.

II. KRS 620.060(1) is Constitutional in Allowing an *Ex Parte* Emergency Custody Order to be Entered Without a Pre-Deprivation Hearing.

The post-deprivation hearing provided to Hoffman satisfied due process considering the state's interest in ensuring that the child would not be exposed to harm. Neither the Sixth Circuit nor the District Court reach the merits of the claim that KRS 620.060(1) is unconstitutional. Citing *Escambia County* v. *McMillan*, 466 U.S. 48, 104 S.Ct. 1577, 80 L.Ed.2d 36 (1984) (per curiam), on remand 748 F. 2d 1037 (5th Cir. 1984), the District Court held that because the case was decided on non-constitutional grounds, it should avoid deciding a constitutional issue. (Order and Judgment, Pet. A. p. 34a.) Notwithstanding the Courts'

sound reasoning in declining to address the constitutionality of KRS 620.060(1), the State Defendants affirmatively assert that: 1) Hoffman failed to plead and demonstrate that the post-deprivation hearing was inadequate; 2) Applying the factors in *Matthews* v. *Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the Constitution does not require a hearing when it is necessary to protect a child from serious and imminent physical psychological or emotional harm; 3) Hoffman failed to demonstrate that a pre-deprivation hearing would have prevented the imposition of supervised visitation.

Hoffman omitted in his Complaint the fact that he was afforded a post-deprivation hearing and consequently, it was not alleged that the hearing was inadequate.

The due process prongs are set out in *Matthews* v. *Eldridge*, 424 U.S. at 335 (1976) and are as follows:

> First, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and that fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Applying the *Matthews* factors to Hoffman's situation, it is evident that the post-deprivation hearing provided by KRS 620.080(1)(a) satisfied due process. The private interest affected by the *ex parte* order was the type of visitation Hoffman was to have with his child. Hoffman was to have supervised visitation instead of the previous unsupervised arrangement. Unsupervised visitation is not a federally protected constitutional claim. Pursuant to *Scrivner* v. *Andrews*, 816 F.2d 261 (6th Cir. 1987), parents have no enforceable right to "meaningful visitation."

The requirement of supervised visitation is not a "deprivation", and hence Hoffman did not have a "clearly established right". Therefore, the second prong of *Matthews* is not applicable.

As to the Government's interest, there is no contest when the desire of Hoffman to have unsupervised visitation is balanced against the government's interest in protecting a child from an alleged sexual abuser. Courts have recognized that the liberty interest in familial relations is limited by the compelling governmental interest in protecting minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves. *Fitzgerald* v. *Williamson*, 787 F.2d 403 (8th Cir. 1986); *Myers* v. *Morris*, 810 F.2d 1437 (8th Cir. 1987); *Newton* v. *Burgin*, 363 F.Supp. 782 (1973), *affirmed* 414 U.S. 1139 (1974).

KRS 620.060(1) is clearly constitutional and the writ should be denied.

III. The "Functional" Analysis of *Salyer* v. *Patrick*, Applies and Gives Absolute Immunity to a Social Worker who Filed an Affidavit Which Led to the Issuance of an Emergency Custody Order Pursuant to KRS 620.060(1).

While Petitioner agrees with the Court below that the Ninth and Sixth Circuits apply the "functional" approach, and that under *Salyer* v. *Patrick*, 874 F.2d 374 (6th Cir. 1989), the social workers in the case *sub judice* would be afforded absolute immunity, he contends that a writ should be granted to resolve a conflict between the other circuits.

The cases cited by Petitioner from various circuits in no way conflict with *Salyer*, or each other, nor would they change the result in this case. Petitioner's Complaint stated "[t]hat . . . at the behest of West and Defendant Hoffman, Harris testified by Affidavit or sworn testimony to the

Fayette District Court that [Ian Hoffman was allegedly sexually abusing a child.]" (Pet. A. p. 47a.).

The Plaintiffs in *Salyer* sued under 42 U.S.C. §1983, alleging that two social workers filed a juvenile court petition without adequately investigating a report that the child had been sexually abused. An emergency custody order was subsequently obtained. The Sixth Circuit held:

> It appears to this court that the family service workers were absolutely immune from liability in filing the juvenile abuse petition, due to their quasi-prosecutorial function in the initiation of child abuse proceedings. See *Meyers* v. *Contra Costa County Dep't of Social Services,* 812 F.2d 1154, 1157 (9th Cir. 1987) *cert. denied.* ___U.S. ___, 108 S.Ct. 98, 98 L.Ed.2d 59 (1987).
>
> *Id.* at 378.

The *Salyer* court held that the filing of a child abuse petition is an integral part of the judicial process because social services workers function as prosecutors in bringing the child before the juvenile court.

A reading of the cases cited by Petitioner reveals that except for the two Pre-*Salyer* district court cases of *Rinderer* v. *Delaware County Children and Youth Services,* 703 F. Supp. 358 (E.D. Pa. 1987) and *Czikalla* v. *Malloy,* 649 F.Supp. 1212 (D.C. Colo., 1986), the Circuit cases all recognize the "functional" approach to absolute immunity and in no way conflict with each other or the decision of the court below.

In *Spielman* v. *Hildebrand,* 873 F.2d 1377 (10th Cir. 1989), a case cited by the Petitioner, the Tenth Circuit carefully distinguished absolute from qualified immunity, stating that the test was

> whether the defendants' action in this case constituted advocacy functions sufficiently related to initiating judicial proceedings to justify absolute immunity. Some courts have utilized the analogy to prosecutorial functions to award absolute immunity to social workers performing the function of initiating dependency proceedings against parents suspected of child abuse. (Citations omitted).
>
> *Id.* at 1382.

It is obvious from review of petitioner's complaint that the accused actions of the social workers were directly related to advocacy before a judicial body.

As there is no conflict between the circuits and *Salyer* clearly applies, the writ should be denied.

IV. The Social Workers Were Entitled to Absolute Immunity as to Their Participation in an Abuse Action Filed in the Jurisdictionally Sound District Court.

Petitioner argues on page eighteen (18) of his petition that the social workers "went outside their investigatory duties to obtain an *ex parte* order from a Court which they should have known lacked the jurisdiction to issue." Although jurisdiction was not raised in Petitioner's complaint, he cites no factual or legal grounds in his petition for this assertion.

Under KRS 610.010(1) and (6) and KRS 620.010, jurisdiction for abuse proceedings and removal is with the District Court.

In addition, it is legally unsound and illogical to argue that the social workers' quasi-prosecutorial duties were somehow converted to and should be defined as investigatory functions if the District Court is deemed to have lacked jurisdiction over the action.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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